

NO. PD-00787-18

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
3/6/2019
DEANA WILLIAMSON, CLERK

DEMOND FRANKLIN,
Appellant
v.

THE STATE OF TEXAS,
Appellee

APPELLEE'S BRIEF ON THE MERITS
AFTER GRANTING OF
DISCRETIONARY REVIEW

On appeal from the Fourth Court of Appeals,
No. 04-17-00139-CR, and the 290th District Court of
Bexar County, Trial Court No. 2015-CR-6149A,
Honorable Melisa Skinner, Judge Presiding

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BY NOT RAISING IT IN THE TRIAL COURT.
HOWEVER, THE REST OF THE
COURT OF APPEALS' ANALYSIS
IS CORRECT. THE BURDEN OF PROOF
IS ON APPELLANT TO PROVE HIS AGE,
AND HE OFFERED NO PROOF AT TRIAL,
PROBABLY BECAUSE HE WAS 28 YEARS
OLD AT THE TIME OF THE OFFENSE.

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STATEMENT OF THE CASE

The State agrees with Appellant's statement of the case. In brief, Appellant was convicted of capital murder by a jury and as the State was not seeking death the trial court automatically sentenced Appellant to life in prison without parole.

The Fourth Court of Appeals affirmed the case. *Franklin v. State*, No. 04-17-00139 (Tex.App.—San Antonio 2018, pet. granted). This Court granted review.

STATEMENT OF FACTS

A statement of facts is unnecessary to the resolution of this issue on appeal. In brief, Appellant was one of a group of three young men who decided to rob the drug dealer and friend of one of them. They did so, and Appellant shot the victim in the spine, killing him.

GROUND FOR REVIEW ONE
THE COURT OF APPEALS ERRED
IN RULING THAT APPELLANT'S
MILLER V. ALABAMA CLAIM WAS
FORFEITED BY INACTION.

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THE COURT OF APPEALS ERRED
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OF EIGHTEEN ON OCTOBER 22, 2014.

STATE'S RESPONSE

THE COURT OF APPEALS WAS INCORRECT
TO HOLD APPELLANT WAIVED THIS CLAIM
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HOWEVER, THE REST OF THE
COURT OF APPEALS' ANALYSIS
IS CORRECT. THE BURDEN OF PROOF
IS ON APPELLANT TO PROVE HIS AGE,
AND HE OFFERED NO PROOF AT TRIAL,
PROBABLY BECAUSE HE WAS 29 YEARS
OLD AT THE TIME OF THE OFFENSE.

SUMMARY OF THE ARGUMENT

The court of appeals did fail to follow this Court's holding in *Garza v. State* that failure to raise a claim of this type in the trial court did not waive the claim on appeal. However, the court of appeals' holding in *Garza* that a capital murder defendant bears the burden of proof to prove his age was settled law by the time of Appellant's trial. Presumably if Appellant had had any proof to offer that he was under eighteen at the time of trial he would have done so. This was impossible because APPELLANT WAS 28 YEARS OLD AT THE TIME OF THE OFFENSE. This Court seems to wish to further define how to deal with this type

of claim procedurally, and such clarification is apparently needed, but this is not the case for it. This Court should hold this petition was improvidently granted and dismiss this appeal.¹

ARGUMENT

In *Garza v. State*, 435 S.W.3d 258 (Tex.Crim.App. 2014), the defendant raised a claim on appeal that he might have been under the age of eighteen at the time of the capital murder for which he'd been sentenced to life without parole. The court of appeals had affirmed because Appellant didn't raise this issue in the trial court. This Court held, however, "Garza's claim was not forfeited by his failure to urge his claim in the trial court." *Id.* at 263.

On remand, the Fourth Court acknowledged the necessity of addressing the merits of the defendant's claim. *Garza v. State*, 453 S.W.3d 548, 550 (Tex.App.—San Antonio 2014, pet. ref'd). The Court did so, being persuaded by the State's argument that a claim to being under eighteen at the time of the capital murder is akin to a claim of intellectual disability as a bar to execution. The defendant should bear the burden of proof by a preponderance of the evidence. *Id.* at 553. The Court went on to hold:

¹ Attached to this brief as an appendix is a booking page showing Appellant's age at the time of his arrest was 29, as well as the indictment in this case showing Appellant has the same SID number as the person on the booking page. Also attached is a certified copy of a Bexar County information page showing Appellant's name, SID number, and date of birth. I will attempt to supplement the record with these documents, or this Court can order it so supplemented.

Our conclusion on this issue is supported by practicality. It is Garza's own age that must be established. He would naturally have more convenient access to documentation or other evidence establishing his age at the time of the offense, e.g., a birth certificate, driver's license, identification card, etc. Thus, it is not unduly burdensome to require Garza to establish his age at the time of the offense.

This Court refused review in *Garza*, so the holding above is settled law in the Fourth Court district.

Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), established it is unconstitutional automatically to sentence a defendant to life in prison without the possibility of parole if he was under the age of eighteen at the time he committed the offense. *Miller* was very recent at the time of the trial in *Garza*, so it was no surprise defense counsel for Garza may not have known about it. But it is well-established now. Appellant's counsel very likely knew of the holding and would have raised that defense if he'd had any evidence to prove his client was underage at the time of the murder. He did not.

Garza told Colorado police during his arrest and detention process that he was nineteen, and seventeen, and eighteen. 453 S.W.3d at 550. So there was evidence in the record to suggest he may have been only seventeen years old at the time he committed the offense. Here there was no evidence to suggest Appellant was younger than 18 at the time of the offense. He was actually 28 years old, almost 29, so there was no reason for his counsel to raise this potential defense to

the sentence.

So while technically this issue wasn't "waived" by not being raised at trial, it wasn't raised, either, in a trial in which Appellant had the burden of proof on this issue, so there was nothing for the court of appeals to address. This is a different form of waiver, such as when a defendant doesn't put on any evidence of self-defense. He is not forfeiting any claim on appeal that has merit.

Appellant claims the burden of proving one's age is "virtually impossible to meet." Appellant's brief at 14. This is absurd. The Fourth Court of Appeals, as set out above, suggested this standard could be met by showing a driver's license or ID card. There may be very rare instances in which a person charged with capital murder doesn't know his age, but this is not such a case, so this portion of Appellant's challenge is academic and not raised by this case.

Appellant would have this Court impose on Texas trial judges in every capital murder trial an affirmative duty to inquire into every defendant's age at the time of the offense, even if it is apparent to everyone in the courtroom the defendant is nowhere near his teen years. By the time a capital murder case comes to trial, both the prosecution and the defense will certainly have ascertained the defendant's age. If this is not an issue in a trial, no one should have a duty of proof on it, just as no one is required to prove the defendant was a "person" and the victim was an "individual," even though there are statutory definitions of such

terms and they are used in the murder statute. Penal Code Sec. 19.02(b), 1.07(26) and (38).

Conclusion

This Court should not require trial courts to go through an unnecessary procedure in every capital murder trial. Certainly this case is not the vehicle to issue such a ruling, since Appellant's age is a non-issue in this case. To reverse the court of appeals and remand to that court or the trial court would be a waste of time and judicial resources. The State respectfully suggests the Court should dismiss Appellant's petition as improvidently granted.

PRAYER FOR RELIEF

The State prays this Court dismiss Appellant's petition as improvidently granted. Alternatively, the State prays this Court will affirm the judgments of the court of appeals and the trial court.

Respectfully submitted,

/s/ Jay Brandon
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State Bar No. 02880500
Attorney for the State

CERTIFICATE OF COMPLIANCE

I certify that the word count of this document is 1,820 words.

_____/s/ Jay Brandon_____
JAY BRANDON

CERTIFICATE OF SERVICE

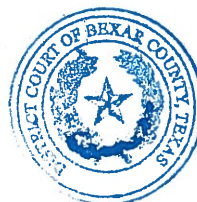
I certify that a copy of the foregoing motion was sent by electronic mail to
Dean Diachin, Attorney for Appellant, on March 6, 2019.

_____/s/ Jay Brandon_____
JAY BRANDON

APPENDIX

***** NO ACTION CODE ENTERED *****

DPW: ***** *** Case Inquiry Page (B1-Page) *** *Action Code: ____
Selection: JCI Qualifier: DC2015CR6149A
Trn: 9112029998 Sfx: A001 030520191406 DCQM 37960
JN CNC Juris *Court Case Nbr Loc Defendant's Name
1667567 2 YES D227 2015CR6149A TDC FRANKLIN, DEMOND
Assignment Nbrs: BCSO: SID: 1042207 Suff: 01
COMPLAINT Date: 10 22 2014 : SAPD: 14235208 R: B S: M DOB: 11 02 1985
*Code *Description :Other: *Stat Code Date Nbr
090114 CAPITAL MURDER - OTHER FELONY G Jury: RID 06 10 2015 0603825
State Off Code: 09990022 GOC: O Prosecutor Action: A *ORI: TX015025A
Off Date: 10 22 2014 Type: FC R/H: *Warrant: RET 0803 06 11 2015 1529477
Reduce Off: *Special Crime Code: Summons:
Date *St War Agcy/Case:
Arrgn: 12 05 2016 H Ph-Crt Custody 06 10 2015 B20145764402
Hrng: 02 23 2017 H D290 Mag Court: CM 005794 Mag Date: 12 16 2014
Trial: 12 12 2016 H Track: C Release: 0217 03 23 2017 TRANSFERRED TO TDC
Sent: 12 12 2016 H Bnd Org: *Bond: RWB 12 12 2016 ** RWOB **
*Case St: 0501 03 01 2017 NOTICE OF APPEAL *Court ORI: TX015185J
*Disp St: 0623 12 12 2016 PNG JRY-GUILTY Yr Mo Dy Hr
*Sent/Jdgt: 0705 12 12 2016 SENTENCE-LIFE Term: 552
Strt Date: 12 12 2016 End Date: *Credit: 552
Deadly Weapon: Last Updated 03 23 2017 0539 SHVZ 18433
KJMPICB1 Help = <PF1> Schd = <PF6> KJCIDB1



CERTIFIED COPY CERTIFICATE OF RECORDS.
I, MARY ANGIE GARCIA, BEXAR COUNTY DISTRICT
CLERK, CERTIFY THAT THE FOREGOING IS A TRUE AND
CORRECT COPY OF THE OFFICIAL RECORD AS INDICATED
BY THE VOLUME, PAGE AND COURT OF SAID DOCUMENT.
WITNESS MY OFFICIAL HAND AND SEAL OF THIS OFFICE.

MAR - 5 2019

By Daniel Delgado DEPUTY

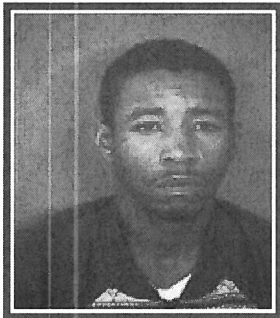


BexarCLAW - Bexar Criminal Listings & Active Warrants

FRANKLIN, DEMOND
SID: 1042207

Photos Bookings General Information

PHOTOS



Age: 29

Date: 12/17/2014

BOOKINGS

BOOKING NUMBER
BOOKING DATE
RELEASE DATE

CHARGES

B201457644
12/17/2014
03/23/2017
CAPITAL
MURDER -
OTHER
FELONY (FC)
CAPITAL
MURDER -
OTHER

ADDRESS

FELONY (FC)
7141
OAKLAWN D
120 SAN
ANTONIO TX
78229-3067

GENERAL INFORMATION

ALIASES	FRANKLIN, DEMOND
DRIVERS LICENSE	NC 23188577
SSN	N/A
FBI NUMBER	N/A
PHONE	N/A
DATE OF BIRTH	11 / 02 / 1985 (WILMINGTON NC)
HEIGHT	5' 10" (70 inches)
WEIGHT	170 lbs
SEX	M
RACE	BLACK
EYE COLOR	BRO
HAIR COLOR	BRO
HAIR STYLE	XXX
FACIAL HAIR	XXX
GLASSES	NO

Defendant: DEMOND FRANKLIN

JN #: 1667567-1

CLERK'S ORIGINAL

Address: 7141 OAKLAWN DR 120, SAN ANTONIO, TX 78229-3067

Complainant: DEANDRE THOMPSON

CoDefendants: RYAN HARDWICK

Offense Code/Charge: 090114 - CAPITAL MURDER - OTHER FELONY

GJ: 603825

PH Court: 290

Court #: 290

SID #: 1042207

Cause #:

Witness: State's Attorney

FILED	
O'CLOCK _____ M	
JUN 10 2015	
DONNA KAY MCKINNEY	
DISTRICT CLERK	
BEXAR COUNTY, TEXAS	
BY <i>Robert Campos</i>	
DEPUTY	

2015-CR-6149A

TRUE BILL OF INDICTMENT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS, the Grand Jury of Bexar County, State of Texas, duly organized, empanelled and sworn as such at the May term, A.D., 2015, of the 290th Judicial District Court of said County, in said Court, at said term, do present in and to said Court that in the County and State aforesaid, and anterior to the presentment of this indictment:

COUNT I

on or about the 22nd Day of October, 2014, DEMOND FRANKLIN, hereinafter referred to as defendant, did intentionally cause the death of an individual, namely, DEANDRE THOMPSON, hereinafter referred to as complainant, by SHOOTING THE COMPLAINANT WITH A DEADLY WEAPON, NAMELY, A FIREARM, and the defendant was in the course of committing or attempting to commit the offense of ROBBERY OF DEANDRE THOMPSON;

COUNT II

on or about the 22nd Day of October, 2014, DEMOND FRANKLIN, hereinafter referred to as defendant, did then and there intentionally and knowingly commit or attempt to commit the felony offense of ROBBERY of DEANDRE THOMPSON, and while in the course of or in furtherance of the commission or the attempted commission of this offense, the defendant did then and there commit an act clearly dangerous to human life, to-wit: SHOOTING THE COMPLAINANT WITH A DEADLY WEAPON, NAMELY, A FIREARM, thereby causing the death of an individual, namely: DEANDRE THOMPSON;

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Cynthia Klist

Foreman of the Grand Jury

INDICTMENT - CLERK'S ORIGINAL